Transfield Projects (M) Sdn Bhd & Anor v Malaysian Airline System Bhd and another application

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTIONS NO R1–25–108 OF 1999 AND NO R2–25–115 OF 1999
KC VOHRAH J
19 JANUARY 2001

Arbitration *— Arbitrator — Jurisdiction — Whether an arbitrator had jurisdiction to entertain a plea at threshold stage — Whether the arbitrator had acted in excess of jurisdiction*

Arbitration *— Award — Setting aside — Application for — Ambiguity or uncertainty — Whether there was uncertainty in the award — Whether there was error of law on the face of the award — — Whether award was void*

Civil Procedure *— Res judicata — Conditions for application of doctrine — Issues, similarity of — Whether issues in fresh action similar to those in earlier action — Whether decision of earlier action a final judgment*

There were two applications before the court in respect of the same award made by the arbitrator on 20 September 1999, which were being heard together. Transfield Projects (M) Sdn Bhd and Bina Logamaya Sdn Bhd ('TBL') and Malaysian Airline System Bhd ('MAS') pursuant to a Joint Reference Agreement dated 19 November 1998 between them had appointed an arbitrator to arbitrate overall disputes, questions and differences between them. MAS objected to paras 16, 17 and 19 in TBL's points of claim contending that the three paragraphs were outside the scope of the reference as: (i) the said paragraphs were the subject matter of actions before the High Court; (ii) the issues raised in the said paragraphs were res judicata; and (iii) the claim made in the reference in relation to the said paragraphs amounted to a multiplicity of proceedings. The arbitrator in an interim award ordered paras 16 and 19 of the points of claim to be struck out and allowed para 17 to remain. In originating motion No R1–25–108–1999 ('the R1 case'), TBL were the applicants with MAS as respondent wherein TBL applied for the award or those parts relating to paras 16 and 19 of the points of claim to be set aside or to be remitted to the arbitrator for reconsideration on the ground that the arbitrator had acted in excess of jurisdiction when he entertained the application by MAS to review paras 16, 17 and 19 of the points of claim and that there was uncertainty in the award and also error of law on the face of the award. In Originating Motion No R2–25–115–1999 ('the R2 case') MAS was the applicant and TBL the respondents wherein MAS had applied for that part of the award in respect of para 17 of the points of claim to be set aside or remitted for reconsideration on the ground that there was error on the face of the award and that the arbitrator had erred in law or misconducted himself. Paragraph 16 pleaded that a variation cum compromise was reached between the parties on 27 February 1998 ('the February 1998 Agreement'). Paragraph 19 raised issues relating

to the eviction of TBL from a site and the consequences thereof. The learned judge in the Kuala Lumpur High Court originating summons No D1–24–75–1998 made certain observations on the application by MAS for an injunction to evict TBL from the site ('the eviction proceedings'). MAS contended that in view of those observations of the judge, the issues sought to be raised under paras 16 and 19 of the points of claim were res judicata. However, in the judgment on the eviction proceedings, the judge stated that 'for the avoidance of doubt, nothing in this judgment shall be construed as in any way affecting the rights of the parties in relation to arbitration proceedings under the contract, …'. MAS also contended that by virtue of an appeal against the decision of those proceedings, issues raised under paras 16 and 19 of the points of claim amounted to a multiplicity of proceedings. Paragraph 17 pleaded facts surrounding the call made by MAS on the performance bond wherein TBL sought inter alia, a full refund of the sums called under the performance bond. MAS argued that the issues raised under para 17 of the points of claim were the subject matter of another action in the High Court ('the performance bond proceedings') and were equally caught by res judicata. In the performance bond proceedings, the High Court dismissed the application of TBL for an injunction to protect the proceeds of the performance bond called upon by MAS. An appeal was lodged by TBL and MAS contended that reliance on para 17 of the points of claim by TBL amounted to a multiplicity of proceedings. The issues for determination were: (i) whether the arbitrator acted in excess of jurisdiction when he entertained the application by MAS to review paras 16, 17 and 19 of the points of claim; (ii) whether there was uncertainty in the award; and (iii) whether there was error of law on the face of the award.

Held, setting aside the award of the arbitrator in respect of paras 16, 17 and 19 with costs to TBL:

(1) The arbitrator did not exceed his jurisdiction having regard to the scope and ambit of the reference in entertaining the plea at the threshold stage as there was nothing in the terms of the reference restricting the arbitrator's power to entertain issues at the threshold stage (see pp 411H, 412A).

(2) An award, in order to be valid must be final, certain, consistent and possible and must decide the matters submitted, and no more than the matters submitted (see p 412B); *Re Brown & Croydor Canel Co* (1839) 9 A & E 522; 8 LJQB 92 followed.

(3) The arbitrator allowed paragraph 17 to remain. By his own findings, the arbitrator accepted that in order for TBL to prove the performance bond issue as part of the claim in the reference and recover the refund of the proceeds, TBL would have to place reliance on the February 1998 Agreement, and for that matter, any breach of, inter alia, the February 1998 Agreement arising out of the eviction from the site. The net effect on the other hand, of the arbitrator's exclusion of paragraphs 16 and 19 of the points of

claim from the scope of the reference, which in effect ruled that the matters relating to the February 1998 Agreement and the eviction from the site and all claims thereunder were not arbitrable, left considerable uncertainty as regards the award and its enforcement. The reasoning adopted by the arbitrator does not allow the parties to proceed with the reference with sufficient certainty as to whether reliance or reference could be made to the February 1998 Agreement. There was indeed uncertainty in the award with consequences which render the said award null and void (see p 413B–D).

(4) It could be seen that by reference to the judgment on the eviction proceedings, there was an omission on the part of the arbitrator to make reference to the final paragraph in the judgment. This final paragraph of the learned judge, an important proviso in the eviction proceedings, clearly removed beyond doubt as to any res applying to matters raised therein for the purposes of future arbitration proceedings. The expressed proviso in the judgment completely escaped the consideration of the arbitrator (see p 414B, D–E).

(5) A prerequisite of any objection of res judicata or multiplicity of proceedings must be that the same or identical issues raised in paragraphs 16, 17 and 19 of the points of claim have been raised and finally determined by the High Court in the eviction proceedings. The judgment in the eviction proceedings only dealt with the issue of licence to occupy the site and provided for injunctive and other relief relating thereto. As opposed to the issue that arose for consideration by the learned judge in the eviction proceedings, the issues raised in the reference vis a vis paragraphs 16 and 19 were clearly distinct and different. In the reference, TBL sought to rest their rights vis a vis wrongful repudiation and breach of contract of the February 1998 Agreement and consequences flowing therefrom. TBL were not seeking to test the issue as to whether they had a licence to occupy the site which was quite different from seeking to enforce their contractual rights under the original main contract or the February 1998 Agreement as varied (see pp 414F, H, 415B–D).

(6) The other crucial distinction that does not make paragraphs 16 and 19 of the points of claim res judicata was that the determination by the High Court in the eviction proceedings vis a vis the February 1998 Agreement was not a necessary step to the decision or a matter which it was necessary to decide; the issue relating to the February 1998 Agreement was not fundamental to what the High Court had decided in the eviction proceedings and if anything, was merely incidental or collateral to it. In fact, the judgment in the eviction proceedings did not determine the issue relating to the February 1998 Agreement. In any event, the judgment in the eviction proceedings was interlocutory and limited in nature and not final vis a vis the main issue concerning

the legality of determination of the main contract or the February 1998 Agreement between the parties, and subsequent events arising therefrom (see p 415F–H).

[**Bahasa Malaysia summary**

Dua permohonan dikemukakan di hadapan mahkamah mengenai award yang sama yang diberikan oleh penimbangtara pada 20 September 1999, yang dibicarakan bersama-sama. Transfield Projects (M) Sdn Bhd dan Bina Logamaya Sdn Bhd ('TBL') dan Malaysian Airline System Bhd ('MAS') berekoran satu Perjanjian Rujukan Bersama bertarikh 19 November 1998 di antara mereka telah melantik seorang penimbangtara untuk menimbangtarakan segala pertikaian, soalan dan perbezaan di antara mereka. MAS membantah perenggan-perenggan 16, 17 dan 19 dalam alasan tuntutan TBL dan berhujah bahawa tiga perenggan tersebut berada di luar lingkungan rujukan kerana: (i) perenggan-perenggan tersebut merupakan perkara tindakan-tindakan di hadapan Mahkamah Tinggi; (ii) perkara-perkara yang dibangkitkan dalam perenggan-perenggan tersebut adalah res judicata; dan (iii) tuntutan yang dibuat dalam rujukan tersebut berkenaan perenggan-perenggan tersebut merupakan satu kepelbagaian prosiding. Penimbangtara tersebut dalam satu award interim memberi perintah agar perenggan 16 dan 19 alasan tuntutan dibatalkan dan membenarkan perenggan 17 dikekalkan. Dalam usul pemula No R1-25-108-1999 ('kes R1 tersebut'), TBL merupakan pemohon dengan MAS sebagai responden di mana TBL memohon agar award tersebut ataupun bahagian-bahagian yang berkaitan dengan perenggan 16 dan 19 alasan tuntutan diketepikan atau dikembalikan kepada penimbangtara untuk pertimbangan semula atas alasan bahawa penimbangtara tersebut telah bertindak di luar bidangkuasanya apabila beliau melayan permohonan MAS untuk mengkaji semula perenggan-perenggan 16, 17 dan 19 alasan tuntutan dan bahawa tedapat keraguan dalam award tersebut dan juga kekhilafan undang-undang pada zahir award tersebut. Dalam usul pemula No R2-25-115-1999 ('kes R2 tersebut') MAs merupakan pemohon dan TBL merupakan responden di mana MAS telah memohon agar bahagian award berkenaan perenggan 17 alasan tuntutan tersebut diketepikan atau dikembalikan untuk pertimbangan semula atas alasan bahawa terdapat kekhilafan pada zahir award tersebut dan bahawa penimbangtara tersebut telah khilaf atau tersalahlaku. Perenggan 16 merayu agar satu variasi atau kompromi dicapai di antara pihak-pihak pada 27 Februari 1998 ('Perjanjian Februari 1998 tersebut'). Perenggan 19 membangkitkan perkara-perkara berkenaan pengusiran TBL dari suatu tapak dan akibat tindakan tersebut. Hakim yang alim dalam Usul Pemula No D1–24–75–1998 Mahkamah Tinggi Kuala Lumpur membuat beberapa pemerhatian terhadap permohonan MAS untuk satu injunksi untuk mengusir TBL dari tapak tersebut ('prosiding pengusiran tersebut'). MAS berhujah bahawa memandangkan pemerhatian hakim tersebut, perkara-perkara yang ingin dibangkitkan di bawah perenggan 16 dan

19 alasan tuntutan tersebut adalah res judicata. Walau bagaimanapun, dalam penghakiman prosiding pengusiran tersebut, hakim menyatakan bahawa 'untuk mengelakkan keraguan, tiada apa-apa dalam penghakiman ini akan ditafsirkan sebagai dapat menjejaskan hak pihak-pihak dalam prosiding timbangtara di bawah kontrak, ...'. MAS juga berhujah bahawa disebabkan satu rayuan terhadap keputusan prosiding tersebut, perkara-perkara yang dibangkitkan di bawah perenggan 16 dan 19 alasan tuntutan tersebut dianggap sebagai satu kepelbagaian prosiding. Perenggan 17 mengemukakan fakta-fakta yang mengelilingi permintaan MAS terhadap bon pelaksanaan tersebut. MAS berhujah bahawa perkara-perkara yang dibangkitkan di bawah perenggan 17 alasan tuntutan tersebut merupakan intipati satu tindakan yang lain di Mahkamah Tinggi ('prosiding bon pelaksanaan tersebut') dan juga tertakluk kepada res judicata. Dalam prosiding bon pelaksanaan tersebut, Mahkamah Tinggi menolak permohonan TBL untuk satu injunksi untuk melindungi hasil bon pelaksanaan yang dituntut MAS. Satu rayuan dikemukakan oleh TBL dan MAS berhujah bahawa pergantungan TBL kepada perenggan 17 alasan tuntutan tersebut dianggap sebagai satu kepelbagaian prosiding. Perkara-perkara untuk diputuskan adalah: (i) sama ada penimbangtara tersebut telah bertindak di luar bidangkuasanya apabila beliau melayan permohonan MAS untuk mengkaji semula perenggan 16, 17 dan 19 alasan tuntutan tersebut; (ii) sama ada terdapat kekhilafan pada zahir award tersebut.

Diputuskan, mengenepikan award penimbangtara tersebut berkenaan perenggan 16, 17 dan 19 dengan kos kepada TBL:

(1) Penimbangtara tersebut tidak melampaui bidangkuasanya memandangkan skop dan lingkungan rujukan tersebut dalam melayan rayuan tersebut pada peringkat ambang kerana tidak terdapat apa-apa dalam terma-terma rujukan yang menghadkan kuasa penimbangtara tersebut untuk melayan perkara-perkara pada peringkat ambang (lihat ms 411H, 412A).

(2) Suatu award, supaya sah, mestilah muktamad, jelas, konsisten dan tidak mustahil dan mestilah memutuskan perkara-perkara yang dikemukakan, and tidak lebih dari perkara-perkara yang dikemukakan (lihat ms 412B); *Re Brown & Croydor Canel Co* (1839) 9 A & E 522; 8 LJQB 92 diikut.

(3) Penimbangtara tersebut membenarkan perenggan 17 kekal. Melalui keputusannya sendiri, penimbangtara tersebut menerima hakikat bahawa agar TBL dapat membuktikan pengeluaran bon pelaksanaan tersebut sebagai sebahagian daripada tuntutan dalam rujukan tersebut dan mendapatkan balik pemulangan bayaran hasil pemerolehan, TBL mestilah bergantung kepada Perjanjian Februari 1998, dan kerana itu, apa jua pelanggaran, antara lain, Perjanjian Februari 1998 yang berpunca dari pengusiran dari tapak tersebut. Akibat pengecualian perenggan 16 dan 19 alasan tuntutan tersebut oleh penimbangtara, yang sebenarnya mengarahkan agar perkara-perkara yang berkaitan dengan

Perjanjian Februari 1998 dan pengusiran dari tapak dan semua tuntutan berkenaannya tidak boleh ditimbangtara, meninggalkan keraguan yang ketara mengenai award tersebut dan penguatkuasaannya. Taakulan yang digunakan oleh penimbangtara tidak membenarkan pihak-pihak meneruskan rujukan tersebut dengan kejelasan yang mencukupi mengenai sama ada pergantungan atau rujukan boleh dibuat terhadap Perjanjian Februari 1998. Memang terdapat ketidakjelasan dalam award tersebut dan akibatnya award tersebut boleh menjadi batal dan tidak sah (lihat ms 413B–D).

(4) Ia dapat dilihat bahawa melalui rujukan terhadap penghakiman ke atas prosiding pengusiran, terdapat satu peninggalan oleh penimbangtara untuk merujuk kepada perenggan terakhir dalam penghakiman tersebut. Perenggan terakhir oleh hakim yang alim ini merupakan satu proviso yang penting dalam prosiding pengusiran tersebut dan dengan jelas menyingkirkan melampaui keraguan apa-apa res yang digunakan dalam perkara-perkara yang dibangkitkan di dalamnya bagi tujuan prosiding timbangtara kelak. Proviso yang dinyatakan dalam penghakiman tersebut tidak dipertimbangkan oleh penimbangtara tersebut langsung (lihat ms 414B, D–E).

(5) Satu prasyarat apa-apa bantahan res judicata atau kepelbagaian prosiding adalah bahawa perkara-perkara yang serupa atau sama yang dibangkitkan dalam perenggan 16, 17 dan 19 alasan tuntutan tersebut telah dibangkitkan dan diputuskan secara muktamad oleh Mahkamah Tinggi dalam prosiding pengusiran tersebut. Penghakiman dalam prosiding pengusiran tersebut hanya mengendalikan isu izin untuk menghuni tapak tersebut dan memberikan injunksi dan relif-relif lain yang berkaitan. Berbeza dengan perkara yang dibangkitkan untuk pertimbangan oleh hakim yang alim dalam prosiding pengusiran tersebut, perkara-perkara yang dibangkitkan dalam rujukan melalui perenggan 16 dan 19 jelas berbeza dan berlainan. Dalam rujukan tersebut, TBL ingin menegaskan hak mereka melalui penolakan yang salah dan pelanggaran kontrak Perjanjian Februari 1998 dan akibatnya. TBL bukannya ingin menguji persoalan sama ada mereka mempunyai izin menghuni tapak tersebut yang agak berlainan dari ingin menegaskan hak mereka di bawah kontrak di bawah kontrak asal utama atau Perjanjian Februari 1998 seperti yang dipelbagaikan (lihat ms 414F, H, 415B–D).

(6) Satu lagi perbezaan yang penting yang tidak menjadikan perenggan 16 dan 19 alasan tuntutan tersebut res judicata adalah bahawa keputusan Mahkamah Tinggi dalam prosiding pengusiran tersebut melalui Perjanjian Februari 1998 bukannya satu langkah yang perlu dalam mencapai keputusan tersebut atau satu perkara yang perlu diputuskan; perkara berkaitan Perjanjian Februari 1998 tersebut tidak asasi kepada apa yang telah diputuskan oleh Mahkamah Tinggi dalam prosiding pengusiran tersebut dan ia hanya satu perkara sampingan. Tambahan pula,

penghakiman dalam prosiding pengusiran tersebut tidak memutuskan perkara mengenai Perjanjian Februari 1998 tersebut. Dalam apa jua keadaan, penghakiman dalam prosiding pengusiran tersebut bersifat interlokutori dan terhad dan bukan muktamad berkenaan perkara utama yang melibatkan keesahan keputusan kontrak utama atau Perjanjian Februari 1998 di antara pihak-pihak tersebut, dan kejadian lain yang diakibatkannya (lihat ms 415F–H).

Notes

For cases on setting aside award by an arbitrator, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 957–979.

For cases on jurisdiction of arbitrator, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 899–900.

For cases on res judicata generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3959–4032.

Cases referred to

Absalom (FR) Ltd v Great Western (London) Garden Village Society [1933] AC 592 (refd)

AG for Trinidad & Tobago v Eriche & Ors (1893) AC 518 (refd)

Brown & Croydor Canel Co, Re (1839) 9 A & E 522; 8 LJQB 92 (folld)

Carl-Zeiss-Stiftung v Rayner and Keeler, Ltd & Others (No 2) [1996] 2 All ER 536 (refd)

Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] MLJ 352 (refd)

Christopher Brown Ld v Genossenschaft [1954] KGB 10 (refd)

Giacomo Costa Fu Andrea v British Italian Trading Co Ltd [1962] 2 All ER 53 (refd)

Kong Wah Housing Development Sdn Bhd v Desplan Constructive Trading Sdn Bhd [1991] 3 MLJ 269 (refd)

Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority [1971] 2 MLJ 210 (refd)

Spens v IRC [1970] 3 All ER 295 (refd)

Tong Lee Hwa & Anor v Lee Yoke San [1979] 1 MLJ 24 (refd)

Legislation referred to

Arbitration Act 1952 s 24(2)

Raja Aziz Iddruse (*P Gananathan* and *HR Goh* with him) (*Logan Sabapathy & Co*) for the applicants in Originating Motion R1–25–108 of 1999 and for the respondents in Originating Motion R2–25–115 of 1999.

Wilfred Abraham (*Muralee Nair* and *J Monteiro* with him) (*Shearn Delamore & Co*) for the respondent in Originating Motion R1–25–108 of 1999 and for the applicant in Originating Motion R2–25–115 of 1999.

KC Vohrah J. : There are two applications before the court in respect of the same award made on 20 September 1999. The Chief Judge (Malaya) has directed that the two applications be heard together.

Transfield Projects (M) Sdn Bhd and Bina Logamaya Sdn Bhd ('TBL') are the applicants in Originating Motion No Rl–25–108–1999 ('the R1 case') with Malaysian Airline System Bhd ('MAS') as the respondent. In Originating Motion No R2–25–115–1999 ('the R2 case') MAS is the applicant and TBL are the respondents.

TBL and MAS, pursuant to a joint reference agreement dated 19 November 1998 between them, had appointed an arbitrator to arbitrate overall disputes, questions and differences between them.

MAS objected to three paragraphs, paras 16, 17 and 19 in TBL's points of claim, contending that the three paragraphs were outside the scope of the reference as:

(1) the said paragraphs were the subject matter of actions before the High Court;

(2) the issues raised in the said paragraphs were res judicata: and

(3) the claim made in the reference in relation to the said paragraph amounted to a multiplicity of proceedings.

The arbitrator in an interim award ordered paras 16 and 19 of the points of claim to be struck out and allowed para 17 to remain.

In essence, TBL have applied to this court for the award or those parts relating to paras 16 and 19 of the points of claim to be set aside or to be remitted to the arbitrator for reconsideration on the ground that the arbitrator had acted in excess of his jurisdiction when he entertained the application by MAS to review paras 16, 17 and 19 on the points of claim, and that there was uncertainty in the award and also error of law on the face of the award.

MAS on the other hand, applied for that part of the award in respect of para 17 of the points of claim to be set aside or remitted for reconsideration on the ground that there was error on the face of the award and that the arbitrator had erred in law or misconducted himself.

Paragraphs 16, 17 and 19

There is a need to have a look at the nature of paras 16, 17 and 19 of the points of claim which were objected to by MAS at the proceedings before the arbitrator.

Paragraph 16 pleads that a variation cum compromise was reached between the parties on 27 February 1998 ('the February 1998 agreement').

Paragraph 19 of the points of claim raised issues relating to the eviction of TBL from a site and the consequences thereof.

The learned judge in the Kuala Lumpur High Court Originating Summons No D1–24–75–1998 made certain observations on the application by MAS for an injunction to evict TBL from the site ('the eviction proceedings'). MAS contended before the arbitrator that in view of these observations of the judge, the issues sought to be raised under paras 16 and 19 of the points of claim are res judicata. MAS also contended that by virtue of an appeal lodged in the Court of Appeal against the decision in these proceedings, issues raised under paras 16 and 19 of the points of claim amounted to a multiplicity of proceedings.

Paragraph 17 pleads facts surrounding the call made by MAS on the performance bond, wherein TBL seeks, inter alia, a full refund of the sums called under the performance bond.

TBL had contended, inter alia, that MAS had acted in breach of the main contract and in breach of the February 1998 agreement in making the call. MAS argued that the issues raised under para 17 of the points of claim are the subject matter of another action in the High Court Kuala Lumpur, High Court Originating Summons No–Dl–24–75–1998 ('the performance bond proceedings') and are equally caught by res judicata.

In the performance bond proceedings, the High Court on 15 May 1999 dismissed the application of TBL for an injunction to protect the proceeds of the performance bond called upon by MAS. There was an appeal lodged by TBL in the Court of Appeal against the said decision in the performance bond proceedings and MAS contended that reliance on para 17 of the points of claim by TBL amounted to a multiplicity of proceedings.

On 17 September 1999, the arbitrator, in making an award, ruled on paras 16, 17 and 19 of the points of claim. As was mentioned earlier, the arbitrator allowed para 17 to remain, but struck out paras 16 and 19 from the points of claim.

The R1 case

Excess of jurisdiction

TBL have argued that the arbitrator had exceeded the scope of his reference by entertaining the objections of MAS on paras 16, 17 and 19 of the points of claim at the threshold stage despite the fact that the scope and ambit of the reference was wide and had encompassed all disputes, questions and differences between the parties 'in respect of the said project as defined and to other matters connected to the performance of the said contract and the rights and obligations of the parties thereunder.'

Having regard to the extrinsic evidence relating to the drafting of the joint reference agreement dated 19 November 1998, which the court is permitted to look into, (see *Christopher Brown Ld v Genossenschaft* [1954] KGB 10) especially MAS's letter through the solicitors dated 2 September 1998 that '[our] clients are of the view that the arbitrator's authority to decide should not be restricted and should be left to issues pleaded by either party…', it seems clear enough that the reference is worded widely. But having said that, it has to be noted that there is, on the other hand, nothing in the terms of the reference restricting the arbitrator's power to entertain issues at the threshold stage. TBL had raised issues in paras 16, 17 and 19 in their points of claim, and MAS's defence to that is that the issues are barred by res judicata. The issues can in fact be dealt with at the trial, or an attempt made to have the offending issues struck out (see *Halsbury's Laws of England* (4th Ed Reissue) Vol 16, p 862, para 977). MAS had decided to bring the issues up at the threshold stage instead of dealing with them later in the proceedings.

I do not see the arbitrator having exceeded his jurisdiction having regard to the scope and ambit of the reference in entertaining the plea at the threshold stage.

Uncertainty in award

An award, in order to be valid, must be final, certain, consistent and possible and must decide the matters submitted, and no more than the matters submitted: *Re Brown & Croydor Canel Co* (1839) 9 A & E 522; 8 LJQB 92.

As has been stated in *The Law and Practice of Commercial Arbitration in England* by Mustill & Boyd (1982) at p 499:

> The court has jurisdiction to set aside or remit an award if it fails to comply with the requirements imposed by the submission or the common law, and if this failure is apparent on the face of the award. Under this heading may be grouped the following requirements —
>
> (1) ...
>
> (2) …
>
> (3) The award must be certain. It must be possible to ascertain from the award what decision the arbitrator has reached on the issues; and where the award is in the form of a special case, it must be possible to ascertain the findings of the arbitrator on all issues of fact relevant to the issues of law.
>
> (4) …
>
> (5) …

TBL submitted that the award is uncertain on the face of it.

The argument is this — that by striking out paras 16 and 19 of the points of claim in the award, the arbitrator had in effect ruled that the matters relating to the February 1998 agreement and the eviction from the site and all claims thereunder are not arbitrable. But in the same award the arbitrator allowed para 17 of the points of claim (pertaining to the performance bond issue) to remain. Paragraph 17 of the points of claim refers and places reliance, inter alia, on a breach of the February 1998 agreement, resulting from which TBL sought a refund of the proceeds of the performance bond. What has been stressed is that the performance bond issue cannot be arbitrated without the benefit of reliance on facts and circumstances surrounding the February 1998 agreement.

It will be noted that the arbitrator himself recognized this in that part of his award dealing with para 17 of the points of claim. At p 2 of the said award, this is what was stated:

> … The contention by the claimant, in essence, is that the respondent wrongfully and in breach of the main contract, alternatively the February 1998 agreement and the addendum, made a call on the performance bond, which in the circumstances, amounted to unconscionable conduct. The relief the claimant seeks on the basis of the above contentions is the refund of the amount that the respondent had received from the bank.

At p 3 of the said award, this is what is stated by the arbitrator:

> …The summons in chambers and the notes of the proceedings before the judge suggests that the real issue that the judge was faced with in hearing that

summons in chambers was not whether in making a call on the bond there was a breach of the contract, or whether there had been a compromise reached and that there had been a wrongful breach of that, but whether, in the fact of the dispute having been referred to arbitration, he should make an order to protect the proceeds of the call on the bond. That he dismissed the application shows that he did not think he should. There was no call for him to consider or consider in depth, and there is nothing to suggest that he had so considered, issues pertaining to the alleged wrongful breach of the contract or of the alleged compromise agreement.

The arbitrator allowed para 17 to remain. By his own findings, the arbitrator accepted that in order for TBL to prove the performance bond issue as part of claim in the reference and recover the refund of the proceeds, TBL would have to place reliance on the February 1998 agreement, and for that matter, any breach of, inter alia, the February 1998 agreement arising out of the eviction from site. The net effect on the other hand, of the arbitrator's exclusion of paras 16 and 19 of the points of claim from the scope of the reference, leaves considerable uncertainty as regards the award and its enforcement. With respect to the arbitrator, the reasoning adopted by him does not allow the parties to proceed with the reference with sufficient certainty as to whether reliance or reference can be made to the February 1998 agreement. There is indeed uncertainty in the award with consequences which render the said award null and void.

Error on face of the award — Failure to give due regard to the proviso that nothing in the judgment would affect the parties in relation to the arbitration proceedings

In deciding whether paras 16 and 19 of the points of claim are res judicata, the arbitrator referred to the pleadings in the eviction proceedings and the grounds of judgment therein. The affidavits filed in the eviction proceedings were reviewed and he concluded that the contents were more or less identical to the statements contained in para 16 of the points of claim. The arbitrator also relied on the judgment in the eviction proceedings and concluded that the learned judge in the eviction proceedings did not avoid the issues placed before him in making a finding that the February 1998 agreement was not breached. On this basis, and on the ground that para 19 of the points of claim also made reference to the February 1998 agreement, the arbitrator was satisfied that both paras 16 and 19 are res judicata, that there was a multiplicity of proceedings and that they were liable to be struck out together with consequential prayers.

It has to be remembered, relying on *Sharikat Pemborong Pertanian & Perumahan v Federal Land Development Authority* [1971] 2 MLJ 210, which followed English cases including *Absalom v Great Western (London) Garden Village Society* [1933] AC 592 in that 'it is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him.' (per Raja Azlan Shah J, as his Highness then was). As was pointed out by His Lordship:

> In the former case, the court can interfere if and when any error appears on the face of the award but in the latter case, no such interference is possible upon the ground that the decision upon the question of law is an erroneous one.

If the award incorporates other documents, a court may review the award against these other documents to see if there is an error on the face of the award (see *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1962] 2 All ER 53 at p 62).

Since the judgment has been referred to, the court may look at the judgment. It can be seen by reference to this judgment that there was an omission on the part of the arbitrator to make reference to the final paragraph in the judgment on the eviction proceedings. This is what was expressed by Selventhiranathan J in the judgment in the eviction proceedings:

> … For the avoidance of doubt, nothing in this judgment shall be construed as in any way affecting the rights of the parties in relation to arbitration proceedings under the contract, and particularly the issue of whether the defendant repudiated the contract, as claimed by the plaintiffs, and which purported repudiation the plaintiffs accepted, or whether the plaintiffs repudiated the contract unilaterally, as claimed by the defendant.

This final paragraph of the learned judge, an important proviso to his judgment in the eviction proceedings, clearly removes beyond doubt as to any *res* applying to matters raised therein for the purposes of future arbitration proceedings. The expressed proviso in the judgment completely escaped the consideration of the arbitrator.

MAS has attempted to show a comparison between the matters dealt with in TBL's points of claim, the grounds of judgment of Selventhiranathan J and the memorandum of appeal filed by TBL in the Court of Appeal in respect of the learned judge's decision, but nothing really turns on the comparison.

A pre-requisite of any objection of res judicata or multiplicity of proceedings must be that the same or identical issues now raised in paras 16, 17 and 19 of the points of claim have been raised and finally determined by the High Court in the eviction proceedings. The next obvious question would be what are the issues that were determined by the High Court in the eviction proceedings and what are the issues that are now being sought to be arbitrated by TBL under the reference?

MAS, in the eviction proceedings, had sought injunctive relief to evict TBL from the site. The sole question or issue arising in the eviction proceedings related to the licence of TBL to remain on site (see the ex parte summons in chambers in the eviction eroceedings, exh 'A-13', encl 2, pp 268–272 in the R1 motion). The fact that MAS may have sought to claim more than that in their notice of counterclaim in the eviction proceedings, namely for a declaration that the February 1998 agreement did not exist, does not derogate from the fact that the judgment in the eviction proceedings only dealt with the issue of licence to occupy the site and provided for injunctive and other relief relating thereto. The learned judge in the eviction proceedings, when granting injunctive relief with the effect that TBL was to vacate the site, only declared that TBL's licence to occupy the site had been terminated.

In any event, one needs to look no further than the judgment in the eviction proceedings, where the learned judge exercised his discretion and awarded the limited injunctive relief evicting TBL from the site on the basis of the legal position relating to contractors in the position of TBL. Having cited the decision of Abdul Malek J (as then was) in *Kong Wah Housing Development Sdn Bhd v Desplan Constructive Trading Sdn Bhd* [1991] 3 MLJ 269, the learned judge held that a contractor who is no longer wanted must vacate the site wherein its remedy lies in damages for any wrongful repudiation of the contract.

As opposed to the issue that arose for consideration by the learned judge in the eviction proceedings, the issues raised in the reference, vis a vis paras 16 and 19, are clearly distinct and different. In the reference, TBL sought to rest their rights vis a vis wrongful repudiation and breach of contract of the February 1998 agreement and consequences flowing therefrom. TBL are not seeking to test the issue as to whether they had a licence to occupy the site, which is quite different from seeking to enforce their contractual rights under the original main contract or the February 1998 agreement as varied.

The learned arbitrator in the award seemed have treated the February 1998 agreement as an issue that was placed before the learned judge in the eviction proceedings. But it is clear that the February 1998 agreement was never an issue determined by the High Court in the eviction proceedings. The fact that TBL may have relied on the February 1998 agreement to resist the injunction sought by MAS in the eviction proceedings does not make it an issue that was decided upon by the judgment in the eviction proceedings. The decision of the High Court must have involved a determination of the same question as that sought to be controverted in the in the reference before estoppel arises (see *Carl-Zeiss-Stiftung v Rayner and Keeler, Ltd & Others (No 2)* [1996] 2 All ER 536 at p 584).

The other crucial distinction that does not make paras 16 and 19 of the points of claim res judicata is that the determination by the High Court in the eviction proceedings, vis a vis the February 1998 agreement, was not a necessary step to the decision or a matter which was necessary to be decided; the issue relating to the February 1998 agreement was not fundamental to what the High Court had decided in the eviction proceedings, and if anything, was merely incidental or collateral to it (see *Carl-Zeiss-Stiftung v Rayner and Keeler, Ltd & Ors* at p 584; *Spens v IRC* [1970] 3 All ER 295 at p 301).

In fact, the judgment in the eviction proceedings did not determine the issue relating to the February 1998 agreement. In any event, the judgment in the eviction proceedings was interlocutory and limited in nature and not final, vis a vis the main issue concerning the legality of determination of the main contract or the February 1998 agreement between the parties, and subsequent events arising therefrom (see *Tong Lee Hwa & Anor v Lee Yoke San* [1979] 1 MLJ 24 at p 24; *AG for Trinidad & Tobago v Eriche & Ors* (1893) AC 518 at p 523; *Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] MLJ 352 at p 355).

No doubt TBL had filed an appeal against the decision of the learned judge in the eviction proceedings, but this was in order to protect their position arising from the comments made by the judge in the judgment in the eviction proceedings on the basis that the learned judge, in all the circumstances, should not have had made such a finding. There cannot be a multiplicity of proceedings where the same issues are not raised. If the plea of res judicata does not apply, then paras 16, 17 and 19 of the points of claim equally cannot be objected to on the grounds of multiplicity.

In all the circumstances of the case, on the face of the said award, the arbitrator had made an error in arriving at the legal conclusion that paras 16 and 19 of the points of claim were res judicata and therefore were liable to be struck out. For the same reason, the arbitrator had misconducted himself and the proceedings in the sense were used technically under s 24(2) of the Arbitration Act 1952 (Act 93).

By reason of uncertainty in the award as to whether the parties can rely on and make reference to the February 1998 agreement when the arbitrator continues with the proceedings in the arbitration, and also by reason of the error on the face of the award where the arbitrator had,when considering the judgment of Selventhiranathan J in the eviction proceedings, ignored the proviso in the judgment that nothing in the judgment would affect the parties in relation to the arbitration proceedings, and by reason of the misconduct of the arbitrator for the same reasons the whole award should be set aside. The arbitrator took issue with paragraphs which were raised at the threshold stage and the full arbitration proceedings have yet to start. The issues raised can easily be dealt with at the full proceedings; and the expenses at the threshold stage cannot be greater than the expenses that would be incurred for the full proceedings. It would be more just that the issues raised in paras 16, 17 and 19 are considered during the course of the full proceedings instead of my remitting the same to be reconsidered at the threshold stage, again incurring more expenses. I therefore set aside the interim award in its entirety.

In view of the fact that I have held that there is uncertainty in the award and there was also an error on the face of the award when the learned arbitrator ignored the proviso of the learned judge in the eviction proceedings' judgment, and of my order that the whole award should be set aside, the issue raised by MAS in regard to para 17 has been subsumed in the findings and the order I have made. In effect, the award in respect of para 17 is also set aside together with the order relating to paras 16 and 19 though not for the reason advanced by MAS that the learned arbitrator did not have the benefit of the judgment of the learned judge in the performance bond proceedings. The application is disallowed.

Costs in R1 and R2 to TBL.

Award of arbitrator in respect of paras 16, 17 and 19 to be set aside with costs to TBL.

Reported by Moy Saw Han